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In the Supreme Court of the United States

OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

v.

MICHAEL BUCKLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS and BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

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QUESTIONS PRESENTED

Amici shall address the following questions:

1. Whether on the specific facts of this case, the Second Circuit was correct in its finding that Michael Buckley's daily, unprotected exposure to asbestos fibers satisfied the traditional "physical impact" test as well as *Gottshall's* "zone of danger" test?

2. Whether the Second Circuit was correct in its ruling that the Federal Employers' Liability Act ("FELA") permits Michael Buckley to recover the quantifiable cost of periodic medical monitoring made necessary by toxic exposure caused solely by Metro-North's negligent workplace practices?

3. Whether Metro-North's argument that medical monitoring poses problems of claim-splitting is timely and if properly before this Court, does FELA's statutory goal require Michael Buckley to choose between reasonable and necessary medical surveillance treatment now or help later?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF THE AMICI CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 3

ARGUMENT 7

I. THERE WAS NO NEED FOR THE SECOND CIRCUIT TO UTILIZE THE GOTTSHALL "ZONE OF DANGER" TEST BECAUSE IT HAS NO APPLICATION TO THE FACTS OF THIS CASE 7

II. THE SECOND CIRCUIT WAS CORRECT IN RULING THAT MEDICAL MONITORING WAS A REASONABLE MEDICAL EXPENSE COMPENSABLE UNDER FELA GIVEN MICHAEL BUCKLEY'S DAILY, UNPROTECTED EXPOSURE AND IMPACT WITH ASBESTOS FIBERS 16

A. THE SECOND CIRCUIT'S SOUND ANALYSIS OF MICHAEL BUCKLEY'S NEED FOR MEDICAL MONITORING IS GROUNDED IN TRADITIONAL TORT LAW AND MODERN MEDICINE 16

B. FELA'S STATUTORY DEFINITION OF "INJURY" IS NOT QUALIFIED BY THE WORDS "ACCIDENTAL," "IMMEDIATE," OR "MANIFEST" 20

C. THE REMEDY OF MEDICAL MONITORING ADVANCES THE DETERRENCE FUNCTION OF FELA 23

D. MEDICAL MONITORING ENABLES WORKERS TO PLAY A MEANINGFUL ROLE IN MITIGATING THE PROGRESSION OF THEIR ASBESTOS RELATED INJURIES 25

E. THERE IS NO LIKELIHOOD THAT RECOGNIZING MEDICAL MONITORING WILL RESULT IN A LITIGATION EXPLOSION 26

III. THIS COURT SHOULD CONSIDER ABANDONING THE SINGLE CONTROVERSY RULE IN FELA TOXIC TORT CASES 26

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

Anselmi v. Penrod Drilling Corp.
813 F. Supp. 436 (E.D. La. 1993)..... 9

Ayers v. Jackson Township
525 A.2d 287 (N.J. 1987)..... 13, 24

Ball v. Joy Technologies, Inc.
958 F.2d 36, 39 (4th Cir. 1991)..... 19

Borel v. Fibreboard Paper Products Corp.
493 F.2d 1076 (5th Cir. 1972), cert. denied,
419 U.S. 869 (1976)..... 19, 23

Buckley v. Metro-North Commuter Railroad
79 F.3d 1337, 1340 (2d Cir. 1996). ..... passim

Burns v. Jaquays Mining Corp.
752 P.2d 28 (Ariz. Ct. App. 1987)..... 18, 24

Consolidated Rail Corp. v. Gottshall
114 S.Ct. 2396 (1994)..... passim

Eagle-Picher Industries, Inc. v. Cox
481 So. 2d 517 (Fla. 3d Dist. 1985), review den'd,
492 So. 2d 1331 (Fla. 1986). 8

Friends for All Children v. Lockheed Aircraft Corp.
746 F.2d 816, 825 (D.C. Cir. 1984)..... 17, 24, 25

Gerardi v. Nuclear Util. Serv., Inc.
149 Misc. 2d 657, 658, 566 N.Y.S.2d 1002 (1991) 17

Gideon v. Johns-Manville Sales Corp.
761 F.2d 1129 (5th Cir. 1985)..... 13

Hagerty v. L & L Marine Services
788 F.2d 315 (5th Cir.), *modified on denial of rehearing en banc*, 797 F.2d 256
(5th Cir. 1986)..... 9, 18, 25, 27

Hansen v. Mountain Fuel Supply Co.
858 P.2d 970 (Utah 1993) 17, 25

Harned v. E-Z Finance. Co.
151 Tex. 641, 254 S.W.2d 81 (1953) 11

Herber v. Johns-Manville Corp.
785 F.2d 79, 83 (3d Cir. 1986) 13

J.H. France Refractories Co. v. Allstate Insur. Co.
626 A.2d 502 (Pa. 1993) 12

Kernan v. American Dredging Co
355 U.S. 426 (1958). 19, 21, 22

Laxton v. Orkin Exterm. Co., Inc.
639 S.W.2d 431 (Tenn. 1982); 8

Marchica v. Long Island R.R. Co
31 F.3d 1197 (2d Cir. 1994), cert. denied
115 S.Ct. 727 (1995) 14

Merry v. Westinghouse Elec. Corp.
684 F. Supp. 847 (M.D. Pa. 1988)..... 17

Meyerhoff v. Turner Construction Co.
202 Mich. App. 499, 509 N.W.2d 847 (1993)..... 17

Mitchell v. Rochester R. Co.
151 N.Y. 107, 45 N.E. 354 (1896)..... 11

Mollien v. Kaiser Foundation Hospitals
616 P.2d 813 (Cal. 1980) 9

Mortise v. United States, 1996 U.S. App. Lexis 33508 (2d Cir. Dec. 24, 1996)..... 9

Morton v. Stack
122 Ohio St. 115, 170 N.E. 869 (1930) 8

In re Paoli Railroad Yard Litigation
35 F.3d 717 (3rd Cir. 1994) cert. denied,
115 S.Ct. 1253 (1995) (Paoli II) 19

In re Paoli Railroad Yard PCB Litigation
916 F.2d 829, 849-50 (3rd Cir. 1990), cert denied,
499 U.S. 961 (1991) ("Paoli I") 19, 23, 26

Plummer v. United States
580 F.2d 72 (3rd Cir. 1978)..... 8

Porter v. Delaware, L. & W. R.Co.
73 N.J.L. 405, 63 A. 860 (1906)..... 8

Potter v. Firestone Tire & Rubber Co.
6 Cal. 4th 965, 863 P.2d 795 (1993)..... 24

Redland Soccer Club v. Dept. of the Army
55 F.3d 827 (3rd Cir. 1995)..... 13

Reilly v. United States
547 A.2d 894 (R.I. 1988) 11

Schultz v. Barberton Glass Co
4 Ohio St. 3d 131, 133, 447 N.E.2d 109 (1983) 26

Schweitzer v. Consolidated Rail Corp.
758 F.2d 936 (3d Cir.), cert. denied,
474 U.S. 864 (1985). 12

Shenker v. Baltimore & Ohio R. Co.
374 U.S. 1 (1963),..... 21

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674 A.2d 232 (Pa. 1996) 18

Union Pac. R. Co. v. Hadley
246 U.S. 330 (1918). 8

Urie v. Thompson
337 U.S. 163 (1969). 7, 21, 27

Wilkerson v. McCarthy
336 U.S. 53 (1948) 2

Wilson v. Johns-Manville Sales Corp.
684 F.2d 111 (D.C. Cir. 1982)..... 27

STATUTES AND REGULATIONS

Federal Employers' Liability Act, 45 U.S.C. § 51 .....passim

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Enterprise for Personal Injury (Apr. 15, 1991) 20

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Law of Torts §54 (5th ed. 1984)..... 11, 17

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Recovery for the '90s (1990). 11

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Liability Act," 25 San Diego L. Rev. 49 (1988) 23

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Problems (1991)..... 11

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Douglas J. Whaley, Problems and Materials

on Commercial Law (1995) 12

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A 50-Year-Old Man with Recurrent Pleuropulmonary
Abnormalities," 316 N. Eng. J. Med. 198
(January 22, 1987)..... 14

INTEREST OF AMICI CURIAE**

Amici curiae, the International Association of Machinists and Aerospace Workers ("IAM") and Brotherhood of Maintenance of Way Employes, represent approximately half a million members who work in diverse settings including the aerospace, manufacturing, railroad, transportation, wood-working and shipbuilding and repair industries. The IAM has a great interest in full and fair recovery for workers who have been injured by toxic exposures caused by the employer's failure to furnish employees with a safe place to work. The IAM submits that if wrongdoers are not deterred for latent, occupational injuries they cause, they will have no incentive to fulfill their duty to provide a safe workplace. The Federal Employers Liability Act imposes the costs of occupational illnesses on the railroad which creates incentives for optimal safety.

Congress enacted FELA to "protect the lives and persons of employees, by securing a more careful selection of employees, a closer supervision of them and a more rigid supervision of their duties." M.G. Roberts, 2 Federal Liabilities of Carriers §704 at 1315 (2d ed. 1929). This is good public policy. Metro-North and its amici ask this Court to do more than decide this federal railroad worker's compensation case. Metro-North contends that for this Court to reverse the Second Circuit would "advance...important policy concerns affecting the nation's courts, individual litigants, businesses and the public at large." Pet. Br. 7-8. Principles of federalism and judicial restraint dictate that this Court confine itself to evaluating the case below in the context of FELA's remedial purpose rather than federalizing state tort law.

** Letters reflecting written consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

This lawsuit arises under the Federal Employers' Liability Act (FELA) which places "on the railroad industry some of the cost for the legs, eyes, arms and lives which it consumed in its operations." *Wilkerson v. McCarthy, 336 U.S. 53, 68 (1948)* (Douglas, J., concurring). The Second Circuit found medical monitoring to be a reasonably necessary medical cost that should be assigned to the wrongdoer, rather than the injured worker. Medical monitoring deters misconduct and provides just compensation to the victims of employer negligence.

The IAM submits that medical monitoring is a positive development where the early detection and treatment of occupational diseases is possible and beneficial as in this case. The IAM has a great interest in workers obtaining full and fair recovery for all of the harm caused by an employer's reckless indifference to safety. This brief will show the Court that the Second Circuit's decision should be upheld because it is rooted in traditional tort law as well as FELA's distinctive statutory purpose in injury compensation. Amici respectfully submits this brief in support of petitioner to assist the Court in developing FELA rules that construe common law doctrines flexibly in order to accommodate FELA to changing occupational injuries, conditions, and hazards.

STATEMENT OF THE CASE

Metro-North ignores the record in this case when it portrays Michael Buckley as being in no different position than the millions of other Americans who have been merely exposed to asbestos. Michael Buckley worked for Metro-North as a pipe fitter, repairing pipes in the steam tunnels of Grand Central Station. Michael and his co-workers were dubbed the "Snowmen of Grand Central Station" because each workday they "would emerge from their daily duties in the tunnels covered head to toe with white powder." *Buckley v.*

Metro-North Commuter Railroad, 79 F.3d 1337, 1340 (2d Cir. 1996).

In 1985 when Michael Buckley began working in the steam tunnels he received no warning, instruction or protective equipment to prevent the inhalation and ingestion of asbestos fibers. *Id.* After August of 1987 Metro-North acknowledged the asbestos hazard by providing rudimentary asbestos instruction, ill-fitting "half-face respirators," and plastic glove bags to contain the asbestos dust. *Id.* The plastic bags "melted on the hot pipes after the insulation was removed, spilling out" white dust containing asbestos fibers. *Id.*

Metro-North argues that the massive, unprotected exposure of asbestos that Michael Buckley and his co-workers endured, does not constitute compensable harm under the Federal Employers Liability Act ("FELA"). Metro-North and its amici seek to take away the right of the injured railroad worker to full and fair compensation for medical expenses necessitated solely by employer negligence.

SUMMARY OF ARGUMENT

I. Metro-North's description of this case as a mere asbestos exposure case no different than that experienced by millions of other Americans ignores the record below and the Second Circuit's analysis. Metro-North and its amici would like this Court to indulge in judicial tort reform by crafting a federal common law based upon the most restrictive precedents that can be found. Metro-North's call for judicial activism to reform state tort law should be rejected by this Court because it undermines the Congressional purpose of providing railroad workers with a fair and full recovery for injuries caused by railroad negligence.

The Second Circuit was correct in finding that Michael Buckley suffered a physical impact due to his massive prolonged exposure to asbestos fibers both on his body and in the tissue of his lungs.

Metro-North's argument is that the Second Circuit misapplied the *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 114 S.Ct. 2396 (1994) "zone of danger" test. Metro-North wrongly would require physical impact victims to prove more than would be required by traditional tort law: manifested physical injury, severe emotional distress, and an imminent fear of impact. Metro-North and its amici substitute the word "injury" for impact throughout their briefs to persuade this Court to wrongly apply "zone of danger" restrictions on physical impact claimants. Under traditional tort law, physical impact alone satisfies concerns about fraud, proof, and opening floodgates.

Metro-North and its amici are misinterpreting *Gottshall* by arguing that the holding places new restrictions on those direct victims who have sustained a physical impact. This inaccurate reading of *Gottshall* clashes with the Court's statement that "[t]he zone of danger test is consistent with FELA's central focus on physical perils,...[and that] "the rule will further Congress' goal of alleviating the physical dangers of railroading." *Id.* at 2410-11. The only issue decided in *Gottshall* was whether a bystander to the infliction of injury on an unrelated co-worker satisfied the zone of danger standard. In *Gottshall*, this Court did not address, let alone qualify, the traditional physical impact test.

Michael Buckley suffered a legally cognizable physical impact each day when the airborne asbestos fibers settled on his skin and were inhaled and ingested. Traditional tort law has already visited Michael Buckley's scenario of being impacted by a toxic substance. Under the common law, if

dust, smoke or toxic chemicals make contact with the plaintiff, they have suffered a physical impact. The settling of asbestos dust on Michael Buckley's skin, hair, ears, nose, mouth and clothing constituted a physical impact.

The Second Circuit was correct in finding that a reasonable person would have suffered emotional distress from this physical impact. The Second Circuit had a sufficient basis for its finding that Michael Buckley suffered a subclinical injury as well as an impact from asbestos fibers embedded in his lungs. Metro-North knows that Michael Buckley satisfies all of the requirements for negligent infliction of emotional distress under the traditional impact analysis. Given that knowledge, Metro-North urges this Court to apply "zone of danger" restrictions to a situation where there is no problem of a remote bystander suffering unforeseeable distress. Michael Buckley is no Helen Palsgraf. Again, Michael Buckley is an expected physical impact victim injured in an expected manner.

Michael Buckley is a railroad worker who was directly physically impacted by asbestos dust in a classic unsafe workplace. That is not to say that Michael Buckley would necessarily be precluded from recovering if this Court mistakenly applied "zone of danger" restrictions to a physical impact victim. There is little consensus about what qualifiers should be applied to "zone of danger" claimants, contrary to representations made by Metro-North and its amici. The policy reason for qualifiers is to test the genuineness of claims made by "zone of danger" bystanders and indirect victims. Whether Michael Buckley is a direct or indirect victim of asbestos, no reasonable person could consider this to be a fraudulent claim. To insinuate that his emotional distress claim is "suspect," as Metro-North does, disregards the record below.

II. Metro-North seeks to restrict FELA's definition of injury to preclude the victims of toxic exposure from recovering the cost of medical surveillance necessary to detect and treat the onset of asbestos related disease. The Federal Employers Liability Act does not qualify the word injury with adjectives such as "accidental," "immediate," or "physical manifestation". Asbestos related diseases generally have a latency period spanning decades and its victims cannot establish a discernible physical manifestation. FELA's definition of injury is flexible enough to permit reimbursement for the specific cost of periodic examinations to promptly detect and treat asbestos related disease as it develops.

The weight of authority supports medical monitoring in the absence of manifested physical illness where exposure is prolonged to promote the early diagnosis and treatment of disease. Metro-North and its amici argue that this Court needs to apply the most restrictive common law limitations that most other states have rejected. This call for judicial tort reform clashes with FELA's policy of fair and full recovery.

The railroad is the "least cost avoider" in reducing the harm caused by toxic substances in the workplace. It is optimal to deter Metro-North's reckless indifference to safety because its cost savings in exposing untrained and unprotected workers to an asbestos hazard is socially harmful. The railroad's knowledge about the asbestos hazard was superior to regulators as well as the unprotected workers.

Medical monitoring damages is also consistent with the "avoidable consequences" rule and the allowance of medical expense damages under traditional tort law. FELA is a distinctive compensation system for railroad employees, not the general public. Congress made the decision in 1908 to exchange the railroad workers' common law rights which today would include access to the remedy of punitive damages

for full compensation under a uniform, federal common law. Congress did not eliminate the tort concept of deterrence with the *quid pro quo* that exchanged state tort law remedies for FELA recovery. Making the railroad shoulder the responsibility of paying the reasonable costs of medical procedures necessitated by Metro-North's negligence is the only deterrent available in this case.

III. Metro-North procedurally defaulted on its claim-splitting argument in the Second Circuit. Metro-North raises claim-splitting in this appeal for the first time, not out of concern for Michael Buckley's welfare, but for its own advantage. FELA's goal of full and fair compensation should cover Michael's present and future medical expenses. FELA does not compel this Court to make the plaintiff choose between help now and help later. Metro-North argues throughout its brief that Michael Buckley is a "no injury" plaintiff that does not require any compensation for the great harm it has inflicted on Michael Buckley. Metro-North's sincerity in assisting the judiciary in managing latent occupational illness claims is questionable. A FELA claimant is entitled to full recovery for all reasonably necessary medical costs of diagnosing and treating the injuries resulting from the railroad's wrongdoing. This Court adopted the liberal discovery rule 47 years ago in *Urie v. Thompson*, 337 U.S. 163 (1969). Should Michael Buckley develop a full blown asbestos disease, his claim will not be barred by either the statute of limitations nor by the regressive single controversy rule.

ARGUMENT

I. THERE WAS NO NEED FOR THE SECOND CIRCUIT TO UTILIZE THE GOTTSHALL "ZONE OF DANGER" TEST BECAUSE IT HAS NO APPLICATION TO THE FACTS OF THIS CASE.

The Second Circuit had an ample basis for concluding that Michael Buckley was physically impacted and suffered a subclinical injury by daily exposure to asbestos dust over several years. The court noted that asbestos "dust would cover Buckley's skin and clothes and enter his nose and mouth, so that he could taste the chalky insulation material." *Buckley v. Metro-North Commuter Railroad*, 79 F.3d 1337, 1340 (2d Cir. 1996). Metro-North's implausible argument that this prolonged, massive exposure to asbestos is minimal and non-injurious is ludicrous. Is this Court to believe that the attorneys for Metro-North would tolerate their loved ones having to function for even one hour in such a dangerous situation? The Second Circuit had an ample basis for finding that Michael Buckley suffered a physical impact and was harmed when asbestos dust settled on his skin each workday and was inhaled and ingested.[1] This Court should also take a practical view as to whether the impact occurred by heeding Justice Holmes' advice to examine "the situation as a practical unit, rather than inquire into a purely logical priority." *Union Pac. R. Co. v. Hadley*, 246 U.S. 330 (1918).

Metro-North wishes to convert a physical impact case into a zone of danger scenario in order to benefit from the greater restrictions placed on indirect victims. Metro-North takes the simple concept of "physical impact" and embroiders and

[1] Many other courts agree that ingestion or inhalation of a toxic substance constitutes a physical impact. The Third Circuit in *Plummer v. United States*, 580 F.2d 72, 75-76 (3rd Cir. 1978) held that the presence of tubercle bacilli in the bodies of the plaintiffs constituted a sufficient "physical impact" to allow compensation for emotional distress for fear of contracting full blown tuberculosis in the future. *See e.g., Laxton v. Orkin Exterm. Co., Inc.*, 639 S.W.2d 431 (Tenn. 1982); *Eagle-Picher Industries, Inc. v. Cox*, 481 So. 2d 517 (Fla. 3d Dist. 1985), review den'd, 492 So. 2d 1331 (Fla. 1986). Mere dust exposure or the inhalation of smoke has classically qualified as a physical impact. *See e.g., Morton v. Stack*, 122 Ohio St. 115, 170 N.E. 869 (1930) (holding that physical impact test was satisfied by the inhalation of smoke); *Porter v. Delaware, L. & W. R. Co.*, 73 N.J.L. 405, 63 A. 860 (1906) (holding that physical impact was satisfied by dust in the eye).

embellishes it with "zone of danger" limitations which do not apply, and have never applied.[2] Metro-North's attempt to create new doctrine should not be entertained by this Court. Metro-North's uncalled for additions to the physical impact doctrine are (1) physical manifestation of emotional distress; (2) severe emotional distress; and (3) medical or psychiatric evidence of distress. Pet. Br. 34, 37, and 40. Metro-North deliberately misrepresents the requirements for recovery under the physical impact rule. The simple requirement of physical impact is that there be an impact. An impact is sufficient for recovery for emotional distress without the need for physical injury or other qualifying factors.

Metro-North's entire "zone of danger" discussion is wrong. Even if one wanted to apply a zone of danger analysis to a direct impact victim, Michael Buckley could still recover in many jurisdictions.[3] Metro-North is wrong about the

[2] The Second Circuit knows how to handle negligent infliction of emotional distress claims. *Mortise v. United States, 1996 U.S. App. Lexis 33508 (2d Cir. Dec. 24, 1996* (discussing bystander recovery).

[3] Metro-North is picking and choosing "zone of danger" cases that reflect the most restrictive application of the test. There is no requirement of manifested physical injury in many jurisdictions. *Mollien v. Kaiser Foundation Hospitals*, 616 P.2d 813 (Cal. 1980) (stating that physical injury requirement is not justifiable). In *Hagerty v. L & L Marine Services*, 788 F.2d 315 (5th Cir.), *modified on denial of rehearing en banc*, 797 F.2d 256 (5th Cir. 1986), the Fifth Circuit ruled that neither impact nor "physical manifestations" of emotional injury are necessary for an emotional distress claim. *See also Anselmi v. Penrod Drilling Corp.*, 813 F. Supp. 436 (E.D. La. 1993) (holding that no physical manifested harm was required of "zone of danger" plaintiff).

Even if this Court adopted new doctrine requiring physical impact plaintiffs to meet the manifested physical injury requirement that some courts apply to "zone of danger" plaintiffs, Michael Buckley could still recover. Metro-North contends that "the plaintiff has no asbestos related disease or physical injury and in fact shows no physical effect of any kind from asbestos exposure." Pet. Br. 5. The Second Circuit found that Michael Buckley suffered sub-clinical injury when he inhaled and ingested asbestos fibers.

applicability of the "zone of danger" as well as the record in this case that confirms that Michael Buckley was impacted and injured.

The Court in *Gottshall* rightly took the view that the broad language and humanitarian purposes of FELA permits bystanders to recover for mental distress so long as they were in the "zone of danger." W. Page Keeton, et. al., *Prosser and Keeton on the Law of Torts* 365-6 (5th ed. 1984) (noting that American decisions permit non-impact "bystanders...to recover for mental distress provided that they were personally within the "zone of danger"). *Gottshall* does not place new restrictions on the traditional physical impact test, it expands liability to those in the zone of danger. Metro-North argues that the Second Circuit "misinterpreted and misapplied" the zone of danger test articulated by this Court in *Gottshall*. Pet. Br. 21. *Gottshall* restricted the claim of a "bystander outside the zone of danger." *Gottshall*, 114 S. Ct. at 2410. This Court was simply placing limitations on remote or indirect victims, requiring them to be "within the zone of danger of physical impact." *Id.* at 2410. A physical impact victim is by definition in the zone of danger.[4]

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[4] Michael Buckley need not meet an imminence requirement or any other qualifier placed on indirect victims. He is a direct physical impact victim. This is not a "near-miss," nor is Michael Buckley an unrelated bystander or in any other "zone of danger" scenario. The test for physical impact is analogous to a battery, because in both cases there is no need for the plaintiff to prove imminence or apprehension of a harmful or offensive contact. A "battery" requires some physical contact with another without consent and does not require any injury to be actionable. Where there is physical impact, there is no need to show fear of impact in a battery or in an emotional distress action. Metro-North's creativity is evident in its attempt to convert impact doctrine into *fear of impact* doctrine which would make it more difficult for plaintiffs to recover. Where there is impact, there is no need for imminence: impact alone is enough to certify genuineness. When in public discourse, you are referred to as one of the "Snowmen of Grand Central Station" because of being coated with asbestos dust, there can be no serious question that emotional distress is not genuine or severe.

Metro-North evades the history as well as the logic of common law precedents in attempting to convert *Gottshall's* "zone of danger" test into new doctrine which not only bars the recovery of some indirect victims, but which threatens the recovery of all direct impact victims.[5] Turn of the century American courts "refused to permit recovery for such consequences [of emotional distress] unless there had some 'impact' upon the person of the plaintiff...the theory appears to be that the 'impact' affords the desired guarantee that the mental disturbance is genuine." W. Page Keeton et. al., *Prosser and Keeton on the Law of Torts* §54 at 362 (5th ed. 1984).

Some courts adopted the "zone of danger" test to permit recovery to a delimited group of plaintiffs who suffered mental distress but whose claim could not be certified as genuine by the test of physical impact.[6] Early cases, for example,

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[5] Metro-North and its amici substitute the phrase "physical injury" for physical impact to confuse this Court. Contrary to Metro-North's assumption, traditional tort law required physical impact *or* injury. Terrence Kiely, Modern Tort Liability: Recovery for the '90s (1990). Modern courts require impact not physical injury for recovery of emotional distress. "Early 'intentional'" cases required physical manifestations of injury, *e.g.*, *Harned v. E-Z Finance. Co.*, 151 Tex. 641, 254 S.W.2d 81 (1953), and some jurisdictions retain this requirement for negligent infliction. *Reilly v. United States*, 547 A.2d 894 (R.I. 1988). However, the trend seems to abandon in both intentional and negligence cases the requirement that the emotional distress 'ripen' into physical injury." Jerry J. Phillips, et. al, Tort Law: Cases, Materials, Problems 70 n.6 (1991).

[6] An early leading case restricting emotional distress claims to "physical impact" was *Mitchell v. Rochester R. Co.*, 151 N.Y. 107, 45 N.E. 354 (1896). In *Mitchell*, the court denied a plaintiff's recovery for a miscarriage caused by fright from the defendant's onrushing team of horses, because of the absence of impact. Since *Mitchell*, courts have progressively allowed recovery for harm resulting from emotional distress negligently caused, even in the absence of physical impact. W. Page Keeton et. al., Prosser and Keeton on the Law of Torts §54 at 365-6 (5th ed. 1984). There is no empirical evidence that a flood of claims resulted from extending recovery beyond physical impact to bystanders and other indirect victims of emotional injuries. Thomas Lambert, Tort Liability for Psychic Injuries, 41

permitted recovery for the distress a mother would naturally experience in "observing the death of her child...provided that they were personally within the 'zone of danger'" *Id.* at 365. Some courts placed restrictions on "zone of danger" recovery for unrelated bystanders and other indirect victims because of the possibility of fictitious claims. *Id.* at 366.

The Second Circuit did not misinterpret the zone of danger test because it does not apply to the circumstances of this case. There is no doubt that immersion in asbestos dust resulted in Michael Buckley being impacted and injured.[7] The Second Circuit correctly applied the physical impact rule finding sufficiently injurious impact and injury when the "thin, needle-like asbestos fibers" become embedded in lung tissue. *Id.* at 1343.[8]

B.U.L. Rev. 584, 592 (1961) ("The truth of the matter is that the feared flood tide of litigation has simply not appeared in states following the majority rule allowing recovery of psychic injuries without impact").

[7] The defendant and its amici argue that the Second Circuit's decision permitting recovery to Michael Buckley is in conflict with the Third Circuit's decision in *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), cert. denied, 474 U.S. 864 (1985). Pet. Br. 4. *Schweitzer* was not a FELA negligent infliction of emotional distress case and it was decided in a very different setting. Metro-North does not point out that the Third Circuit was deciding the rights of an asymptomatic plaintiff within the context of bankruptcy law. A bankruptcy proceeding often involves equitable powers to deny claims that would not be available for other courts. Douglas J. Whaley, Problems and Materials on Commercial Law 943 (4th ed. 1995) ("[t]he trustee in bankruptcy is given a number of useful rights in resisting or attacking creditor's claims"). FELA does not permit an equitable choice among valid claims in the case of Metro North, a solvent railroad.

[8] The inhalation and ingestion of asbestos also causes an immediate subclinical injury to lung tissue. In *J.H. France Refractories Co. v. Allstate Insur. Co.*, 626 A.2d 502 (Pa. 1993), the court adopted a pathologist's definition of "injury" as a "process which alters structure finding that an insurer had a duty to indemnify against an asbestos related claim. The pathologist defined the accumulation of macrophages in enveloping asbestos fibers as an "indirect injury." *Id.* at 506. It is common sense that Michael Buckley inhaled and ingested asbestos fibers after being enveloped in asbestos dust on a daily basis. Sub-clinical injury occurred as in *J.H.*

Metro-North's alternative argument is that Michael Buckley may have been impacted, but is in no different position than millions of other Americans exposed to asbestos. Pet. Br. 17.[9] Metro-North's argument is that there is no impact without physically manifested injury. The Second Circuit rightly rejected Metro-North's argument that physical impact does not occur unless and until "deadly and debilitating diseases" develops. *Id.* at 1343. In this case, Michael Buckley's being covered from head to toe in asbestos dust on a daily basis is exposure far beyond what normally would be encountered by a person in everyday life. *Redland Soccer Club v. Dept. of the Army*, 55 F.3d 827, 846 (3rd Cir. 1995) (requiring medical monitoring plaintiff to prove exposure "beyond that would normally be encountered in everyday life").

Metro-North is skeptical of the severity of Michael Buckley's emotional distress because he did not go to a psychiatrist. Inhaling and ingesting asbestos dust over a prolonged period is even more frightening than breathing in ordinary smoke or getting ordinary dirt in your eye.[10] Anyone

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France when the "macrophages attempted to ingest the fibers, releasing enzymes which had a damaging effect on injured tissue." *Id.* At the very minimum, there is sub-clinical injury already manifested.

[9] The defendants portray the plaintiff's "massive exposure" in the daily cloud of asbestos fibers as "indeterminate" and thus, indistinguishable from any other workplace exposure. Pet. Br. 16. Metro-North's own consultant found asbestos to be present in 149 of 150 samples of insulation material [JA 231-32; 615-16]. The amount of airborne asbestos was "far in excess" of OSHA's exposure limits. [JA 190; 247]. Metro-North's failure to measure the precise amount of airborne asbestos fibers at any time or any location should not immunize it from liability.

[10] The court in *Ayers v. Jackson Township*, 525 A.2d 287 (N.J. 1987) found the plaintiff's ingestion of water contaminated with toxic chemicals was an "[i]mmediate and direct physical impact and injury." The Fifth Circuit held that the inhalation of asbestos fibers was a physical impact in *Gideon v. Johns-Manville*

enveloped in asbestos dust on a daily basis for several years like Michael Buckley and the "Snowmen of Grand Central Station" would experience anger as well as extreme distress.[11] Metro-North dismisses the severity of the emotional distress experienced by Michael Buckley in order to trivialize his need for medical monitoring. It would not take a psychiatrist to identify one's feelings of insecurity and anxiety over such prolonged and dangerous exposure. *See Marchica v. Long Island R.R. Co.*, 31 F.3d 1197 (2d Cir. 1994), *cert. denied* 115 S.Ct. 727 (1995) (relative inquiry is whether the impact would cause fear in a reasonable person).

Metro-North and its amici also claim that Michael Buckley is a "no injury" claimant. Michael Buckley suffered a sub-clinical injury that may progress into an asbestos related disease.[12] At risk workers "receive adverse treatment in

Sales Corp., 761 F.2d 1129, 1137 (5th Cir. 1985); *See also Herber v. Johns-Manville Corp.*, 785 F.2d 79, 83 (3d Cir. 1986) (holding that an infiltration of asbestos fibers into the plaintiff's lungs was a physical impact).

11 Prosser and Keeton describe the three major concerns for judicial caution when it comes to "recovery for emotional distress: (1) the problem of permitting legal redress for harm that is often temporary and relatively trivial; (2) the danger that claims of mental harm will be falsified or imagined; and (3) the perceived unfairness of imposing heavy and disproportionate financial burdens upon a defendant, whose conduct was only negligent, for consequences which appear remote from the 'wrongful' act." Keeton, *supra*, at 360-61. None of these concerns are present in this case and recovery is proportional to the peril.

12 Metro-North fails to inform this court that asbestos related diseases are latent and progressive and that there are a growing number of courts that recognize medical monitoring in the absence of discernible injury. Moreover, medical monitoring was devised as a remedy for latent, not manifested disease. Monitoring serves a dual purpose of alleviating distress, as well as providing prompt detection and treatment of disease. Metro-North must know that the scientific and medical community cannot detect the symptoms of a manifested asbestos injury so few years after the exposure in this case. *See* G. John Digregorio, "Toxicology of Asbestos," 32(5) Am. Fam Physician 201-204 (November 1985) (stating that "asbestosis is a progressive form of lung fibrosis resulting from the inhalation of asbestos dust"). W.B. Jerry Younger and Eugene J. Mark, "Case 4 1987: A 50-Year-Old Man with

insurance, employment opportunity, credit and other matters based on the contents of [their] medical files." Mark A. Rothstein, Medical Screening of Workers 112 (1984).[13]

This Court held in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 114 S. Ct. 2396, 2410 (1996) that a plaintiff may state a claim for negligent infliction of emotional distress if the defendant's conduct "threatens [the plaintiff] imminently with physical impact"--the zone of danger test. This "zone of danger" test was adopted as "a progressive rule of liability that was less restrictive than the physical impact test...and more consistent than the physical impact test with FELA's broad remedial goals." *Id.* at 2409. Justice Thomas observed that the *Gottshall* zone of danger was progressive and "less restrictive than the physical impact zone of danger test....and more consistent than the physical impact test with FELA's broad remedial goals." *Gottshall*, 114 S. Ct. at 2409. Metro-North seeks to place "imminence" and manifest physical injury

Recurrent Pleuropulmonary Abnormalities," 316 N. Eng. J. Med. 198 (January 22, 1987) (noting that asbestos related diseases may or may not develop within the first 20 to 25 years after exposure). The immediate present, physical injury from asbestos-exposure is sub-clinical.

13 Should Michael Buckley or his co-workers decide a career change, they may be screened out as a high risk applicant due to their medical history. Professor Mark Rothstein states that:

> Many forms of occupational cancer are characterized by long latency periods--as long as 35 years--before the disease is clinically evident. The leading example would be exposure to asbestos. Consequently, an individual with a history of previous exposures may be considered by employers to be a bad risk.

Mark A. Rothstein, Medical Screening of Workers 43 (1985). Employers are increasingly using predictive screening to "calculate which asymptomatic individuals are at an increased risk of future impairment." *Id.* at 23. A 1974 study of industrial physicians confirmed a widespread problem of "even patients with mild illness, which may not increase their morbidity or mortality, are being denied work." *Id* . at 67.

restrictions that neither *Gottshall* nor traditional tort law would apply to direct injury victims. This is not the "zone of danger" case that Metro-North wishes it to be.

II. THE SECOND CIRCUIT WAS CORRECT IN RULING THAT MEDICAL MONITORING WAS A REASONABLE MEDICAL EXPENSE COMPENSABLE UNDER FELA GIVEN MICHAEL BUCKLEY'S DAILY, UNPROTECTED EXPOSURE AND IMPACT WITH ASBESTOS FIBERS

A. THE SECOND CIRCUIT'S SOUND ANALYSIS OF MICHAEL BUCKLEY'S NEED FOR MEDICAL MONITORING IS GROUNDED IN TRADITIONAL TORT LAW AND MODERN MEDICINE

The Second Circuit correctly found that "competent expert testimony...established both that Buckley suffered a *substantial* impact from asbestos that has *significantly* increased his risk of contracting an asbestos related disease and that Buckley should receive medical monitoring in order to ensure early detection and cure of any asbestos related disease he develops." *Buckley*, 79 F.3rd at 1347. Metro-North mischaracterizes the Second Circuit's decision as permitting medical monitoring upon a showing of mere exposure, which would flood the court system with more cases than it could handle. Pet. Br. 47-50. This unfair reading of the Second Circuit's opinion is part of Metro-North's strategy to divert this Court from considering the narrow issue under FELA. There is no evidence that the Second Circuit is unmindful that we live in a society of limited judicial resources where hard choices must be made.

Far from taking a novel approach, the Second Circuit is guided by traditional tort doctrine that permits the cost of reasonable and necessary medical expense incurred and an

appropriate item of damages.[14] Contrary to Metro-North's characterization, medical monitoring is not a separate cause of action. Medical monitoring is a traditional medical expense. The Second Circuit follows the vast majority of cases that hold that medical monitoring is available in the absence of manifested physical disease.[15] Metro-North urges this Court to adopt a minority position that medical monitoring be restricted to those already manifesting the physical symptoms of an advanced disease.[16] This arbitrary restriction frustrates the

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14 Traditional common law tort law permits the allowance of reasonable future medical expenses. *See generally*, Charles T. McCormick, Handbook on the Law of Damages §90 (1935); F. Harper et. al., 4 The Law of Torts §25.9, at 557-58 (2d ed. 1986). The Second Circuit was correct in following the modern trend of the common law that assign the responsibility of medical monitoring to the wrongdoer where the plaintiff proves that recommended monitoring is reasonable, even if there is no physical manifestation. This Court need only take a traditional view of FELA recovery to compensate Michael Buckley for the quantifiable cost of periodic medical examinations which is a necessary expense and there is a value of early detection and diagnosis of asbestos related disease. FELA requires a full and fair recovery. It is only fair that Metro-North be required to pay for regular medical testing and evaluation as is reasonably necessary of a harm it caused. *See* Prosser & Keeton, Torts §30 at 165 (5th ed. 1984).

15 *See e.g. Gerardi v. Nuclear Util. Serv., Inc.*, 149 Misc. 2d 657, 658, 566 N.Y.S.2d 1002, 1003 (1991) (upholding recovery of medical surveillance expenses to two nuclear plant employees who had a history of being enveloped in asbestos dust, even though they were "not presently disabled or suffering disease from exposure to the asbestos"); *See e.g.. Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 977-78 (Utah 1993) (recognizing that plaintiffs exposed to asbestos were eligible to recover medical monitoring damages absent physical injury); *Merry v. Westinghouse Elec. Corp.*, 684 F. Supp. 847, 848-49 (M.D. Pa. 1988) (holding that plaintiffs who ingested water contaminated with toxic chemicals were entitled to recover medical monitoring damages, absent injury provided they prove exposure, potential injury and the need for early detection and treatment).

16 Nearly every federal and state court has upheld recovery of medical monitoring cost, whether or not the plaintiff is manifesting disease. *See e.g. Friends for All Children v. Lockheed Aircraft Corp.*, 746 F.2d 816, 825-26 (D.C. Cir. 1984) (a negligent party is responsible for the cost of medical diagnostic tests even in the absence of physical injury to make the plaintiff whole); *Meyerhoff v. Turner Construction Co.*, 202 Mich. App. 499, 503, 509 N.W.2d 847, 849 (1993) (stating that it is "difficult to dispute that an individual has an interest in avoiding

very purpose of medical monitoring, which is to promptly detect and treat latent diseases as they develop.

Metro-North misreads *Hagerty v. L & L Marine Services*, 788 F.2d 315 (5th Cir. 1986) where the Fifth Circuit upheld medical monitoring under the Jones Act to ensure early detection and treatment of the seaman's possible cancerous condition. Metro-North argues that *Hagerty* does not stand for the abandonment of the physical injury requirement, as the plaintiff "suffered dizziness, leg cramps and a stinging sensation" from exposure. Pet. Brief 20, n. 12. This is an unfair characterization of *Hagerty*. The Fifth Circuit notes that the plaintiff's symptoms of dizziness, cramps, and a stinging sensations were evanescent and that medical monitoring was designed for the detection and treatment of the latent disease as it develops.[17]

Metro-North attempts to sow confusion as to the nature of Michael Buckley's legal claims when it cites many fear of future disease cases. Metro-North discusses every case except this one. This case stands on a different footing than the many

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expensive diagnostic examinations just as he or she has an interest in avoiding physical injury").

17 The Fifth Circuit made it quite clear that the plaintiff had no present manifested disease. The Court stated: "Aside from his ruined shoes, he suffered a brief period of dizziness, followed by leg cramps until he obtained his shower. The following day he [illegible] stinging in his extremities. Because of these symptoms, the extent of his emersion in the chemical, and his understanding of the carcinogenic effect of that chemical, he is now fearful that he will in time contract the disease. Clearly, he does not have the disease at the present time and has suffered no manifestations of any symptoms or ailments attributed to cancer." *Hagerty*, 788 F.2d at 517. The Fifth Circuit had little difficulty in finding that the victim suffered harm and a compensable injury "may be latent and not manifested and discovered until some later date." *Id.* Monitoring was designed for post-exposure, long term disease compensation not to alleviate temporary, immediate physical symptoms such as dizziness, leg cramps, and stinging sensations.

cases cited by Metro-North and its amici that restrict recovery to future disease claimants.[18] Metro-North insists that the Third Circuit's decisions in *In re Paoli Railroad Yard PCB Litigation*, 916 F.2d 829, 849-50 (3rd Cir. 1990), *cert denied*, 499 U.S. 961 (1991) ("Paoli I") and *In re Paoli Railroad Yard Litigation*, 35 F.3d 717 (3rd Cir. 1994) *cert. denied*, 115 S.Ct. 1253 (1995) (Paoli II) are allegedly undermined by a lower federal court decision.[19] The guidelines of *Paoli* have a continuing vitality in assisting courts in determining whether toxic exposures are so significant and substantial to warrant medical monitoring:

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18 The defendant cites a number of "fear of future disease" claims such as *Simmons v. Pacor, Indus.*, 674 A.2d 232 (Pa. 1996) and *Burns v. Jaquays Mining Corp.*, 752 P.2d 28 (Ariz. Ct. App. 1987) to buttress its argument that there is no FELA recovery for emotional distress without manifested asbestos disease. Pet. Br. 11, 12 n.6. For example, Metro-North defendant cites the "future injury" claim of *Ball v. Joy Technologies, Inc.*, 958 F.2d 36, 39 (4th Cir. 1991) for the proposition that medical monitoring claims, in the absence of physical manifestation, "will consume scarce resources." Pet. Br. 44. The *Joy* court recognized the benefit of early diagnosis and treatment but refused to recognize medical monitoring "because such recovery could potentially devastate the court system." *Id.* at 39. The *Ball* court's view was that the legislature should decide on the availability of this remedy. In contrast, Congress intended fair and full recover for railway workers and intended "the creation of no static remedy." *Gottshall*, 114 S. Ct. at 2411 (J. Souter, concurring) (quoting *Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958)). FELA's purpose mandates that there is no hard choice to be made between recovery for full and fair recovery for Michael Buckley versus any future railway claimants. The success of the medical monitoring claim in mitigating harm would be frustrated by the imposition of an artificial and unnecessary physical injury requirement. In any case, Michael Buckley has suffered sub-clinical physiological injuries due to the inhalation and ingestion of asbestos fibers.

19 Metro-North was exposing Michael Buckley and his co-workers to massive amounts of asbestos on a daily basis a decade after the first federal products liability case unprotected exposure to asbestos fibers. *Borel v. Fibreboard Paper Products, Corp.*, 493 F.2d 1076 (5th Cir. 1972), *cert. denied*, 419 U.S. 869 (1976) (upholding an award to an insulation worker who contracted mesothelioma, a cancer of the abdominal lining caused by unprotected contact with asbestos fibers).

(1) plaintiff was significantly exposed to a proven hazardous substance through the negligent actions of the defendant; (2) as a proximate result of such exposure, plaintiff suffered a significantly increased risk of contracting a serious latent disease; (3) that increased risk made periodic diagnostic medical examinations reasonably necessary; and (4) monitoring and testing procedures existed which made the early detection and treatment of the disease possible and beneficial. *Id.* at 852.

The American Law Institute's 1991 Reporters Study recommends medical monitoring as a remedy that is tailored for latent diseases:

> Allowing medical monitoring damages acknowledges that increased risk is a form of injury but confines the award to *costs that flow from the specific harm that has already occurred, not from harms that may occur in the future.* Screening and close follow-up of the exposed population can lead to early diagnosis and treatment of potentially fatal diseases. A monetary award pays for a system of periodic medical examination of the plaintiffs. Consequently, both traditional tort and modern public health rationales support awarding such damages.
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> 2 American Law Institute Reporters' Study, Enterprise for Personal Injury 377, 380-81 (1991) (emphasis ours).

B. FELA'S STATUTORY DEFINITION OF "INJURY" IS NOT QUALIFIED BY THE WORDS "ACCIDENTAL," "IMMEDIATE," OR "MANIFEST."

Section One of FELA provides that "[e]very common carrier by railroad...shall be liable in damages to any person suffering injury while he is employed by such carrier." 45 U.S.C. §51. The FELA imposes liability for "injury" which results "in whole or in part" from the railroad's negligence. *Id.* Metro North and its amici seek to qualify the language of FELA to support its position that the cost of medical surveillance to detect and treat the onset of asbestos related disease is not compensable.

William H. DeParcq and Charles Alan Wright note that "FELA damage rules [are] a distinctive branch of the law; the frequency and severity of injuries to railroad workmen has required courts to answer questions not previously presented or settled in tort law generally." William H. DeParcq & Charles Alan Wright, "Damages Under the Federal Employers' Liability Act," 17 Ohio St. L. J.430, 431 (1956). Forty seven years ago this Court acknowledged the language of FELA "is as broad as could be framed...encompassing provision of FELA where every injury suffered by any employee...was made compensable." *Urie v. Thompson*, 337 U.S. 163, 181 (1949) (recognizing silicosis as a compensable "injury" under the FELA).

Metro-North and its amici ask this Court to convert FELA into a carbon-copy of the most restrictive common law decisions which would preclude medical monitoring in the absence of already manifested disease. The historical purpose of FELA is to broadly construe injury broadly to "adjust equitably between worker and carrier the inescapable expense of human overhead in railroading." *Kernan v. American Dredging Co.*, 355 U.S. 426, 431, 438 (1958).

A railroad employee has long been "entitled to recover compensation...as it is susceptible of estimate in money, for the loss and damage cause to him by the defendant's negligence."

M.G. Roberts, 2 Federal Liabilities of Carriers §891 at 1740 (2d ed. 1929). In *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1 (1963), a defendant railroad argued that it had little opportunity to inspect a defective door in a "foreign" railway car that caused injury to an employee. The late Chief Justice Earl Warren dismissed this argument noting FELA's preemptive duty to provide employees with a safe workplace. Justice Warren was concerned that "legal technicalities" could "perhaps remove from coverage of the Act a significant area of railroad activity." *Id.* at 10.

Metro-North's effort to have this Court adopt a "present physical manifestation" rule for medical monitoring is a ploy to make FELA inapplicable to toxic exposures which involve a long latency period. The effect will be to remove damages stemming from latent occupational injuries from FELA coverage. Metro-North asks this Court to frustrate the humanitarian and remedial purposes of FELA by permitting "legal technicalities" to frustrate the public health purpose of medical monitoring.

There is no specter of bankruptcy haunting Metro-North like the asbestos defendants in many of the cases wrongly cited by the defendant and its amici. Michael Buckley's exposure began in the mid-1980's, long after the risk of unprotected exposure to asbestos was generally known. No floodgate of litigation can be opened by this Court affirming the Second Circuit's decision to permit medical monitoring.

The Second Circuit's decision as to the reasonable necessity of medical monitoring is controlled by liberally construed federal common law, not the most restrictive common law cases that the defendant can find. This Court's task is to "develop a federal common law of negligence under FELA, informed by reference to the evolving common law." *Gottshall*, 114 S. Ct. at 2411 (1994) (J. Souter, concurring).

This Court recognizes that FELA remedies must be flexible and be developed and enlarged "to meet the changing conditions and changing concepts of industry's duty toward its workers." *Kernan v. American Dredging Co.*, 355 U.S. at 432.

C. THE REMEDY OF MEDICAL MONITORING ADVANCES THE DETERRENCE FUNCTION OF FELA.

This Court in *Gottshall* stated that "FELA was intended to provide compensation for the injuries and deaths caused by the physical dangers of railroad work...By imposing liability, FELA presumably also was meant to encourage employers to improve safety measures in order to avoid those claims." *Gottshall*, 114 S. Ct. at 2410. "FELA serves as a real and valuable incentive to promote employee safety in the railroad industry, which remains one of the most hazardous in this country." Jerry J. Phillips, "An Evaluation of the Federal Employers' Liability Act," 25 San Diego L. Rev. 49, 49 (1988).

Metro-North's reckless disregard of Michael Buckley's safety is more egregious than the railroad's PCB contamination in *In re Paoli Railroad Yard PCB Litigation*, 916 F.2d at 829.[20] Metro-North could have eliminated the asbestos danger entirely by providing proper respiratory protection to prevent Michael Buckley from inhaling asbestos

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[20] It is wrong to compare Metro-North's reckless indifference to cases against manufacturers of asbestos who sold a product forty or fifty years ago to an employer who is flagrantly exposing his own employees to asbestos fibers. Metro-North was exposing Michael Buckley and his co-workers to massive amounts of asbestos on a daily basis a decade after the first federal products liability case of unprotected exposure to asbestosis fibers. *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1972), *cert. denied*, 419 U.S. 869 (1976) (upholding an award to an insulation worker who contracted mesothelioma, a cancer of the abdominal lining from unprotected contact with asbestos fibers).

fibers. Metro-North saved money by employing untrained and unlicensed workers to handle and remove asbestos insulation without adequate protection.[21] This Court should also consider the high probability that Metro-North might have escaped detection or punishment altogether if Michael Buckley had not filed this claim. "[I]njurers will not take care in the absence of liability, and the outcome will therefore generally depart from the optimal." Steven Shavell, *Economic Analysis of Accident Law* 11 (1987). Medical monitoring award is a necessary deterrent that will keep Metro-North from externalizing these costs by sacrificing worker safety for profits.

Burns v. Jaquays Mining Corp., 752 P.2d 28 (Ariz. Ct. App. 1987), an authority cited by Metro-North[22] recognized deterrence as a cogent policy consideration for recognizing pre-symptom claims for medical surveillance. *See also Ayers v. Jackson Township*, 525 A.2d 287, 311 (N.J. 1987); *Friends for All Children v. Lockheed Aircraft Corp.*, 746 F.2d 816, 825 (D.C. Cir. 1984) (holding that Vietnamese children in an airplane crash caused by manufacturer's negligence were entitled to medical examinations in order to determine if they suffered neurological deficits and the defendants should pay for them to deter future wrongful conduct) and *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1006-07, 863 P.2d 795, 822-23 (1993) (allowing claims for medical monitoring to deter the irresponsible dumping of hazardous substances). This Court should reject Metro-North's narrow, technical approach to FELA because of the clear need for medical monitoring to deter employers who trade safety for profits.

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21 The outside contractor's trained and licensed workers would have cost Metro-North nearly four times as much per hour as the regular rate of $10.00 paid Michael Buckley and his co-workers. [JA 475, JA 628, Exhibit 1078 (noting $37.00 per hour wage rate for outside contractor qualifed asbestos handlers).

22 Pet. Brief 12, n.6.

D. MEDICAL MONITORING ENABLES WORKERS TO PLAY A MEANINGFUL ROLE IN MITIGATING THE PROGRESSION OF THEIR ASBESTOS RELATED INJURIES

Medical monitoring helps to reduce the overall costs to Metro-North by mitigating the effects of asbestos related disease. Medical monitoring in these circumstances is consistent with the "avoidable consequences rule" of conventional tort law that requires plaintiffs to take reasonably necessary steps to alleviate their condition or be precluded from recovery. *See Restatement (Second) of the Law of Torts* §918(1) (1977) *See* Charles T. McCormick, *Handbook on the Law of Damages* §33 (1935). The medical monitoring remedy is tailor-made to promptly detect and treat asbestos related illnesses as they develop. Medical monitoring is a remedy designed to mitigate Michael Buckley's severe emotional distress at being susceptible to developing an asbestos related disease.[23]

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23 The Fifth Circuit held that medical monitoring of an asymptomatic plaintiff advanced the "avoidable consequences" rule in *Hagerty v. L & L Marine Services Inc.*, 788 F.2d 315 (5th Cir. 1986). The court upheld medical checkups of a toxic exposure claimant to facilitate the "early detection and treatment of a possible cancerous condition." *Id. See also, Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 976 (Utah 1993) (describing monitoring as a form of "mitigation of damages"). *Friends for All Children v. Lockheed Aircraft Corp.*, 746 F.2d 816, 826 (D.C. Cir. 1984) (noting that monitoring advanced avoidable consequences rule). *See generally*, Marilyn Minzer, et. al., 2 Damages in Tort Actions §16.00 at 16-11 (1994) (describing avoidable consequences rational for medical monitoring).

E. THERE IS NO LIKELIHOOD THAT RECOGNIZING MEDICAL MONITORING WILL RESULT IN A LITIGATION EXPLOSION

The "universe of potential FELA plaintiffs... is hardly 'infinite'" because FELA does not govern the "public at large." *Gottshall*, 114 S. Ct. *supra* at 2418 (J. Ginsburg, dissenting). In any case, it would be a perversion of the Act for this Court to show excessive concern for the corporate pocketbook by immunizing Metro-North from liability for its reckless disregard of its duty to maintain a safe workplace. *See* DeParcq & Wright, *supra* at 431 (stating that some courts have protected the corporate pocketbook at the expense of FELA's statutory purpose of providing "full and fair compensation" for the injured person). The proliferation of meritorious claims is no reason to deny justice. *Schultz v. Barberton Glass Co.*, 4 Ohio St. 3d 131, 133, 447 N.E.2d 109, 111 (1983). It is difficult to imagine anyone having the incentive to file a monitoring lawsuit in order to periodically submit to unnecessary medical tests and procedures. *In Re Paoli R. Yard PCB Litigation*, 35 F.3d at 788 (observing that flood of litigation was unlikely "because a plaintiff is not likely to desire to submit to additional tests unless he or she thinks the tests are really needed").

III. THIS COURT SHOULD CONSIDER ABANDONING THE SINGLE CONTROVERSY RULE IN FELA TOXIC TORT CASES

Metro-North argues for the first time to this Court that medical monitoring "will create intractable problems with regard to claims-splitting and statutes of limitations." Pet. Br. 18. The defendant's untimely argument expresses concern that Michael Buckley may be barred from recovering for a future manifest asbestos related disease, if medical monitoring expenses are permitted. The defendant's concern is yet another

example of its strategic tactic of imploring this Court to adopt the most restrictive common law rule to thwart FELA's goal of full and fair recovery for an injured worker.

Should this Court decide to address the claim splitting issue *sua sponte*, it should reject the regressive single controversy rule that undermines the principle of full and fair recovery for latent, progressive diseases. Should Michael Buckley manifest an asbestos related disease, the costs will inevitably be shouldered by his family or taxpayers if the outmoded single controversy rule is followed. The modern trend of toxic tort law is to permit medical monitoring without precluding recovery for disease that may appear many decades later. *See* e.g., *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111 (D.C. Cir. 1982) (construing the "claim splitting" rule so as not to preclude a workers's suit for latent asbestos related disease); *Hagerty v. L & L Marine Services Inc.*, 788 F.2d 315 (5th Cir. 1986) (stating that "[a]t least in the toxic chemical or asbestos cases, the [latent disease] should be treated as a separate cause of action for all purposes" *Id.* at 320. Should this Court address the problem of statute of limitations, it will adopt a "discovery rule" that tolls asbestos workers' cause of action at the manifestation of a disease rather than the time of exposure.

This Court recognized that FELA is a remedial statute when it held that an action for a manifested occupational disease accrues upon discovery, when the plaintiff knew or should have known of the clinical manifestations. *Urie v. Thompson*, 337 U.S. 163 (1949) (recognizing discovery rule for silicosis). As to claims-splitting, Michael Buckley should not lose his claim for a more serious disease that may occur later, because he follows precautions recommended by his doctor. The eradication of inequitable barriers against recovery gives substance to FELA's statutory mandate of full

and fair compensation for workplace injuries caused by the railroad's negligence.

CONCLUSION

Accordingly, Amici Curiae, respectfully submit that the decision of the Second Circuit should be affirmed.

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